

R.D. # 0009-03
Bridgewater, N.J.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

DAVITA INC.

Employer

and

CASE 22-RC-12370

**LOCAL 262, UFCW, RWDSU,
AFL-CIO-CLC**

Petitioner

AMENDMENT TO DECISION AND DIRECTION OF ELECTION

A Decision and Direction of Election issued in this matter on September 11, 2003, wherein, *inter alia*, I concluded that the formula devised by the Board in *Marquette General Hospital*, 218 NLRB 713, 714 (1975) shall be used to determine the voter eligibility of per diem employees. The *Marquette* formula has been applied when there is a significant disparity in the number of hours worked by on-call employees. Under the *Marquette* formula, employees are only eligible to vote in the election if they work at least 120 hours in either of the quarters immediately preceding the election. Where the evidence reveals no such disparity in the hours

worked by on-call employees, those employees are eligible to vote if they regularly averaged 4 hours or more per workweek during the quarter prior to the eligibility date. *Saratoga County Chapter NYSARC, Inc.*, 314 NLRB 609 (1994); *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990).

The Employer has requested review of my decision to apply the *Marquette* formula rather than the *Saratoga* formula. I shall treat the Employer's request for review as a motion for reconsideration and grant its request to apply the *Saratoga* formula to determine the eligibility of per diem employees. As the Employer has correctly argued, in my original decision, I found appropriate a single facility unit in which there is employed only one per diem employee. However, I based my decision to apply the *Marquette* formula upon evidence that there exists a disparity of hours among per diem employees in the multi-facility unit sought by the Employer. Having found appropriate a single facility unit with one per diem employee, I cannot conclude that there is a disparity of hours among per diem employees within that unit. Accordingly, I find it appropriate to apply the *Saratoga* formula, rather than the *Marquette* formula, in the instant situation.

The remaining issues raised by the Request for Review are not being reconsidered by this Amendment to the Decision and Direction of Election and remain before the Board. In view of the fact the instant Amendment is in accord with the Employer's Request For Review as to this aspect of my Decision, I am not

establishing a new Request for Review period. Accordingly, the election currently scheduled for **October 15, 2003** will proceed as scheduled.¹

Signed at Newark, New Jersey this 8th day of October 2003.

Gary T. Kendellen, Regional Director
NLRB Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

362-6712
460-5067-4200

¹ The continued scheduling of the election is also contingent on Petitioner notifying the undersigned promptly, by close of business **October 10, 2003**, that it waives its right to file a Request for Review as to this aspect.